

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

76-7459

**United States Court of Appeals
For The Second Circuit**

SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, AFL-CIO,

Plaintiff-Appellee,

against

LOUIS COMMARATO, PRESIDENT AND BUSINESS MANAGER OF LOCAL UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO; JOHN M. VAUGHN, FINANCIAL SECRETARY OF LOCAL UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO; FRANCES MAIDA, RECORDING SECRETARY OF LOCAL UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO; AND LOCAL UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

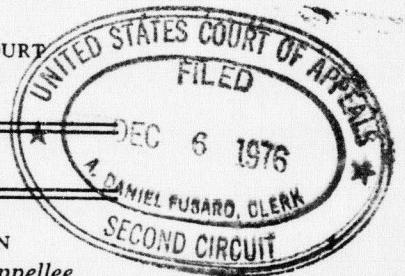
Defendants,

LOUIS COMMARATO, PRESIDENT AND BUSINESS MANAGER OF LOCAL UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO; LOCAL UNION NO. 400, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE



COHEN, WEISS AND SIMON
Attorneys for Plaintiff-Appellee
605 Third Avenue
New York, New York 10016
(212) 682-6077

Of Counsel:

RICHARD L. HARTZ

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES.....	1
Preliminary Statement.....	1
Statement of the Issues Presented for Review.....	2
Statement of the Case.....	2
Statement of Facts.....	3
The Preliminary Injunction Issued by Judge Metzner.....	3
Defiance of the Preliminary Injunction.....	5
Judge Werker's Order.....	6
Defiance of Judge Werker's Order, Subsequent Contempt Petition, and Notice of Appeal.....	9
Summary of Argument.....	10
 ARGUMENT	
POINT I - THE ORDER BELOW MERELY PARTICULARIZED AND CONSTRUED THE PRELIMINARY INJUNCTION, AND IS NOT APPEALABLE.....	11

Page

POINT II - JUDGE WERKER'S ORDER, EVEN
IF DEEMED APPEALABLE, IS
PROPER AND SHOULD BE
AFFIRMED..... 17

CONCLUSION

FOR THE ABOVE-STATED REASONS,
THE ORDER APPEALED FROM SHOULD
BE AFFIRMED..... 25

TABLE OF CASES, STATUTES
AND OTHER AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
<u>Consolidation Coal Co. v. Local Union No. 1784, United Mine Workers of America,</u> <u>514 F.2d 763 (6th Cir. 1975)</u>	15
<u>International Products Corp. v. Koons,</u> <u>325 F.2d 403 (2d Cir. 1963)</u>	13
<u>Local 167, International Brotherhood of Teamsters v. United States,</u> 291 U.S. <u>293 (1934)</u>	20
<u>National Association of Letter Carriers v. Sombrotto,</u> 449 F.2d 915 (2d Cir. 1971).....	21
<u>Securities and Exchange Commission v. Investment Corporation of America,</u> 369 <u>F.2d 383 (7th Cir. 1966)</u>	16
<u>Sheet Metal Workers' International Association, AFL-CIO v. Louis Commarato, President and Business Manager of Local Union No. 400, Sheet Metal Workers' International Association, AFL-CIO, et al.,</u> 92 LRRM 3619 (S.D.N.Y. 1976).....	3, 4, 17
<u>Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.,</u> <u>455 F.2d 770 (2d Cir. 1972)</u>	12
<u>Wynn v. Heller,</u> 391 F. Supp. 507 <u>(S.D.N.Y. 1975)</u>	22, 23

<u>Statutes</u>	<u>Page</u>
Employee Retirement Income Security Act	
Section 2, 29 U.S.C. §1001.....	23
Federal Rules of Civil Procedure	
28 U.S.C. Rule 65(d).....	15, 19
28 U.S.C. §1292(a)(1).....	11, 13, 15, 16
Labor Management Relations Act	
Section 302, 29 U.S.C. §186.....	7, 21, 22, 23
Labor Management Reporting and Disclosure Act	
Section 2, 29 U.S.C. §401.....	23
Section 302, 29 U.S.C. §462.....	4, 17, 18, 21
Welfare and Pension Plans Disclosure Act	
Section 2, 29 U.S.C. §301.....	23
<u>Other Authority</u>	
Moore's Federal Practice, Vol. 9, ¶110.20[2] (2d ed. 1975).....	15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO, :
Plaintiff-Appellee, :
-against- : NO. 76-7459
LOUIS COMMARATO, President and Business Manager of Local Union No. 400, Sheet Metal Workers' International Association, AFL-CIO; JOHN M. VAUGHN, Financial Secretary of Local Union No. 400, Sheet Metal Workers' International Association, AFL-CIO; FRANCES MAIDA, Recording Secretary of Local Union No. 400, Sheet Metal Workers' International Association, AFL-CIO; and Local Union No. 400, Sheet Metal Workers' International Association, AFL-CIO, :
Defendants. :
LOUIS COMMARATO, President and Business Manager of Local Union No. 400, Sheet Metal Workers' International Association, AFL-CIO; and Local Union No. 400, Sheet Metal Workers' International Association, AFL-CIO, :
Defendants-Appellants.

-----x

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York, Hon. Henry F. Werker, entered August 23, 1976. The order appealed from is

is reproduced at page A28 of the Joint Appendix.

STATEMENT OF THE ISSUES PRESENTED
FOR REVIEW

1. Whether a District Court order directing that defendants-appellants comply with a previously issued preliminary injunction which was not appealed is appealable to this Court.
2. Whether the District Court erred in ordering that the defendants-appellants, pursuant to the preliminary injunction, turn over to the duly designated Trustee of a local labor union material relating to union benefit trust funds.

STATEMENT OF THE CASE

The order appealed from required defendants to comply fully with a previously issued preliminary injunction order. The preliminary injunction was issued by Judge Metzner and enforced the trusteeship imposed upon defendant-appellant Local Union No. 400 and its officers by plaintiff-appellee International union. It enjoined Local 400 and its officers from failing to cooperate with Daniel G. Pasquinucci, the Trustee appointed by the International to take full control of the local union. The International originally brought suit in the District Court to enforce its order of trusteeship against the local union and its officers. Judge Metzner rendered his opinion granting

a preliminary injunction on July 21, 1976, and this opinion is reproduced at pages A5 through All of the Joint Appendix, and is reported at 92 LRRM 3619. There is no official citation.

STATEMENT OF FACTS

The Preliminary Injunction Issued by Judge Metzner

The International brought suit in the District Court to enforce its trusteeship order of May 12, 1976. The action sought inter alia, a preliminary injunction enforcing the trusteeship order over Local 400 and its officers and agents, namely, defendant-appellant Louis Commarato, President and Business Manager; John M. Vaughn, Financial Secretary; and Frances Maida, Recording Secretary.

The International had discovered evidence of serious financial abuse within Local 400 and had imposed a trusteeship pursuant to its International Constitution (Complaint, pp. 2-5). Mr. Commarato and the other officer defendants resisted the trusteeship and failed to relinquish control of Local 400 to the duly designated Trustee, Daniel G. Pasquinucci (Complaint, pp. 5-6).

In an opinion dated July 21, 1976, Judge Metzner granted a preliminary injunction against "Local 400, its officers, agents, etc." (All). Judge Metzner's opinion cited the "essentially

"unrefuted" factual allegations of financial corruption within Local 400 and the fact that the trusteeship had been imposed for proper purposes under both the International Constitution and Section 302 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §462 (A6-A10). The court emphasized that the "obvious showing of irreparable harm involved with the potential further continuation in power of the individual defendants makes the granting of a preliminary injunction proper." (A11). On the same day on which the court issued its opinion, it granted Mr. Commarato's motion "to dismiss the complaint against Louis Commarato individually" by endorsement upon the notice of motion (A3, A4).

On July 26, five days after the court's opinion was issued and seven days before an injunction was signed on August 2, 1976, Louis Commarato and other Local 400 officers resigned their positions (A18, A27).

The preliminary injunction issued by Judge Metzner restrained and enjoined "the above-named defendant Local Union No. 400, Sheet Metal Workers' International Association, AFL-CIO, their officers, employees and agents" from

"1. Taking any official action on behalf of Local Union No. 400, Sheet Metal Workers' International Association, AFL-CIO, except

upon approval of General President Edward J. Carlough or his personal representative;

2. Refusing to recognize and be bound by the order of trusteeship issued by Edward J. Carlough, General President of Sheet Metal Workers' International Association, AFL-CIO;

3. Refusing to recognize and be bound by the assumption of control by Daniel Pasquinucci, as Representative of General President Carlough and Trustee over Local Union No. 400, pursuant to said order of trusteeship;

4. Refusing to turn over all monies, books, records and property of Local Union No. 400 to Daniel Pasquinucci as said Representative and Trustee;

5. Refusing to vacate the office of Local Union No. 400 at 14th Broadway, New York, New York, upon the direction of Daniel Pasquinucci." (A12-A13).

The above-named officers were the other officers named in the complaint including the defendant-appellant, Louis Commarato, President and Business Manager (A12).

No appeal was taken from the preliminary injunction.

Defiance of the Preliminary Injunction

Mr. Commarato refused to comply with the demand of the International Trustee, made pursuant to his powers under the trusteeship order and the preliminary injunction, that Commarato

turn over to him

"all of Local 400's documents relating to any health, welfare and/or pension trust funds or plans in which members of Local 400 and the employers with whom it has collective bargaining agreements participate." (A17).

The Trustee, Mr. Pasquinucci, had learned upon examining Local 400 collective bargaining agreements that employers were obligated to pay directly to Local 400 amounts equal to as much as 6% of employees' gross weekly earnings as welfare contributions and amounts equal to as much as 4% as pension contributions (A18). The contracts referred to instruments governing such employee benefit funds, and the Trustee sought these and other materials concerning the funds (A17, A18, A19). Mr. Commarato had informed the Trustee that he was the administrator of one of the funds, operating it from the same address as he had operated Local 400 (A18). When Mr. Commarato refused the Trustee's second demand, the International moved for an adjudication in civil contempt.

Judge Werker's Order

Judge Werker heard the International's motion since Judge Metzner was on vacation. Trustee Pasquinucci, in his affidavit to the court, stated:

"I must have copies of all documents pertaining to the Welfare Fund and the Sheet Metal Production Pension Fund if I am effectively to protect the interests of the membership of Local 400 and oversee the affairs of Local 400 in accordance with the trusteeship and the mandate of this Court. These documents are essential to ascertaining the identity of the trustees of these funds and the manner in which they are chosen. I must be able to determine if the trustees are adequately protecting the interests of the membership of Local 400, and if any trustees should be replaced, and the role of the union in replacing them. Similarly, these documents are essential in determining whether the contributions remitted in the past have been used to provide welfare and pension benefits for the members of Local 400, or for some other purpose.

Furthermore, there appears to be the possibility of criminal violations of Section 302 (restrictions on payments to employee representatives) of the Labor Management Relations Act (29 USC §§186 et seq.) in that the funds in question are paid under the contract directly to the union rather than to a jointly administered trust fund satisfying the requirements of Section 302(c)(5) of the LMRA. Thus, the critical need for a full and complete investigation into the finances and structure of Local 400 can only be met if I obtain all trust agreements, pension and welfare plans and Rules and Regulations, and all amendments thereto, bankbooks, and related documents.

The trusteeship, and this Court's Order in aid of it, have the orderly, lawful and proper administration of Local 400 as their goal, but that objective cannot be reached if the defendants are permitted to circumvent the clear intention of the order of the Court. These trust agreements and related papers are essential and basic records and property of Local 400. If the same individuals operated the funds and Local 400 and from the same

premises, the removal of records and documents into separate quarters does not change the fact that these records are the records of Local 400. And the fact that the funds might be separate legal entities does not alter the Local Union's entitlement to possession of copies of those instruments which are signed by Local 400 officials and intended for the benefit of Local 400 members. Nor does the fact that Local 400 officials resigned after the Court rendered the opinion in this case allow them to avoid the obligations of this Court's order. The defendants here are defying the order of this Court, and further exercise of the power of the Court is therefore required." (A19, A20).

Mr. Commarato asked that the International's contempt petition be denied (A27). After hearing argument on August 20, 1976, the court issued the order now appealed from:

"Upon the summons, complaint, exhibits, affidavits, oral arguments, memoranda of law and all other papers on file herein, and upon plaintiff's application for an order adjudicating defendants in civil contempt, it is hereby

ORDERED that Louis Commarato and other defendants herein fully comply with the order of preliminary injunction rendered by this Court on August 2, 1976 (Hon. Charles M. Metzner) and, pursuant to the same, deliver forthwith to Local Union No. 400 trustee Daniel G. Pasquinucci all documents, agreements, trust indentures, plans of benefits, rules and regulations, all amendments or modifications thereto, and other papers relating to all health, welfare and/or pension funds which are or have ever been provided for in collective bargaining agreements of Local Union No. 400." (A28).

Defiance of Judge Werker's Order, Subsequent Contempt Petition,
and Notice of Appeal

The International renewed its petition for an adjudication in civil contempt when Mr. Commarato delivered to the Trustee only a single document relating to the welfare fund and only a single document relating to the pension fund. [S.D.N.Y., No. 76-Civ-2279(CMM)]. The contempt petition is pending in the District Court. After the International had again moved for contempt, a Notice of Appeal was filed in this Court on behalf of Local 400 and Louis Commarato (Notice of Appeal filed September 14, 1976). On September 21, 1976, this Court denied the defendants-appellants' motion for a stay of Judge Werker's order pending determination of the instant appeal (Order of the U.S. Court of Appeals for the Second Circuit, No. 76-8424).

SUMMARY OF ARGUMENT

The International contends that:

1. Judge Werker's order is not appealable to this Court because it is not a District Court order granting, continuing or modifying an injunction. The order is simply a particularization of responsibility under the preliminary injunction, which was not appealed from, and, as such, is a non-appealable construction of an injunction by the court below.

2. Judge Werker's order was proper in scope, given the broad provisions of the preliminary injunction and given the purposes of the trusteeship which it enforced. The defiance of the injunction by the defendants, and the International Trustee's bona fide need for information concerning the benefit trust funds, fully justified Judge Werker's express direction that defendant-appellant Commarato comply with the injunction.

These contentions will be discussed in the above order.

ARGUMENT

POINT I

THE ORDER BELOW MERELY PARTICULARIZED AND CONSTRUED THE PRELIMINARY INJUNCTION, AND IS NOT APPEALABLE.

Contrary to the position here urged by defendants-appellants, Judge Werker's order was not a modification of Judge Metzner's preliminary injunction. Rather, Judge Werker, short of adjudicating defendants in civil contempt, chose to make explicit the defendants' responsibilities under the injunction. Since the District Court construed and did not modify or continue the injunction - indeed, was not asked for modification or continuance - the order particularizing it is not appealable under 28 U.S.C. §1292(a)(1). Thus, this Court lacks jurisdiction over the appeal.

Judge Werker's order is appealable only if it is within the jurisdictional grant of 28 U.S.C. §1292(a):

"The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, ... or of the judges thereof, granting, continuing, modifying ... injunctions... ."

Judge Werker's order was not a modification of Judge Metzner's preliminary injunction. Although he had been asked to adjudicate defendants in civil contempt for their failure to o'

Judge Metzner's injunction, Judge Werker evidently

"...properly considered his duty to be to take only such action as he believed to be immediately required to preserve the status quo with a view to enabling Judge [Metzner] to resume control upon his return." Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.
455 F.2d 770, 772 (2d Cir. 1972).

The status quo obtaining before Judge Werker was that the injunction had already been in force for some time. The defendants had altered the status quo, refusing to obey the injunction by not turning over to the International Trustee the records and documents relating to Local 400's affiliated health, welfare and pension funds. Consequently, Judge Werker initially required that

"...Louis Commarato and other defendants herein fully comply with the order of preliminary injunction rendered by this Court on August 2, 1976 (Hon. Charles M. Metzner)..." (A28).

The issue before Judge Werker was not the validity of the injunction; the question was whether the Trustee was entitled to have the records relating to the various Local 400 funds under the broad provisions of the injunction (A12-A13) and the trusteeship it enforced. Having decided that the Trustee was so entitled by the injunction, Judge Werker concluded his order as follows:

"...and, pursuant to same, deliver forthwith to Local Union No. 400 trustee Daniel G. Pasquinucci all documents, agreements, trust

indentures, plans of benefits, rules and regulations, all amendments or modifications thereto, and other papers relating to all health, welfare and/or pension funds which are or have ever been provided for in collective bargaining agreements of Local Union No. 400." (A28) (emphasis supplied).

Thus, Judge Werker's order simply particularized the defendants' responsibilities under the already existent preliminary injunction.

In International Products Corp. v. Koons, 325 F.2d 403 (2d Cir. 1963), upon which appellants rely, this Court stressed that

"We think it better, in line with our prior decisions, to continue to read §1292(a)(1) as relating to injunctions which give or aid in giving some or all of the substantive relief sought by a complaint... ." (325 F.2d at 406).

It was the preliminary injunction itself which granted relief sought in the complaint. The order granting that injunction could have been appealed, but was not. Judge Werker's subsequent order did not enlarge this relief. This asserted appeal is an attempt by Mr. Commarato to reverse his choice not to appeal the underlying injunction, and an effort to place the validity of that injunction before this Court at this late date.

In Appellants' Brief, Commarato argues that Judge Werker's order modified the preliminary injunction because it explicitly ran against "Louis Commarato and other defendants" despite Mr. Commarato's dismissal as a defendant by Judge Metzner on July 21, 1976. The

designation of Commarato was in no sense a modification of the injunction. The identical caption of both Judge Metzner's injunction and Judge Werker's order identifies as a defendant "Louis Commarato, President and Business Manager of Local Union No. 400, SMWIA, AFL-CIO" (A12, A28). With respect to Commarato, the sole difference in the body of the orders is that the injunction runs against Local 400's "officers, employees, and agents" (A12) whereas Judge Werker's order names the chief officer, "Louis Commarato" as well as "the other defendants herein" (A28).

Quite clearly, both orders are directed against Commarato in his capacity as Local 400's President,* and not in his capacity as an individual. It was only in his individual

*In the District Court, Commarato argued that his resignation as President of Local 400 on July 26, 1976 relieved him of responsibility under the injunction (A25-A27). The International pointed out that Commarato's resignation occurred after Judge Metzner rendered his opinion granting the injunction against Local 400's officers but before the actual order was signed. So timed, the resignation was nothing but a "transparent attempt to evade the Court's lawful power." (Plaintiffs' Memorandum of Reply In Support of Its Application to Adjudicate Defendants In Civil Contempt of Court, pp. 7-8). The International's position has always been that Commarato, in his capacity as Local 400 President, and later as former Local 400 President, has at all times remained a defendant in this action. Neither the court's dismissal of Commarato in his individual capacity nor his resignation from the office of Local 400 President alter that fact.

We note that in this Court Commarato has apparently abandoned the argument that his resignation relieves him of responsibility under court orders as Appellants' Brief makes but one reference to it. Appellants' Brief, p. 8.

capacity that Commarato was excused as a defendant. This is clear from his own notice of motion which the court subsequently endorsed (A3). Of course, a court may differentiate between the capacities of a defendant union official in the particular factual situation presented. See Consolidation Coal Co. v. Local Union No. 1784, United Mine Workers, 514 F.2d 763 (6th Cir. 1975). Under Rule 65(d), Federal Rules of Civil Procedure, in any case, Commarato would have been bound as an officer even if he had not been specifically named in any order. Commarato has always been, and continues to be, the central figure resisting complete effectuation of the trusteeship. So it was realistic and appropriate specifically to include him in the order clarifying the injunction on a particular issue.

Judge Werker's order was not a continuation of the injunction within the meaning of 28 U.S.C. §1292(a)(1). An injunction is continued within the meaning of that section when the court decides to continue it in response to a motion for its dissolution or modification. See 9 Moore's Federal Practice, ¶110.20[2], at pp. 238-39 (2d ed. 1975). Here there was no request that the injunction be discontinued or modified. There was never any question of its basic validity or of its remaining in force. Indeed, there was not even a request for construction

of the injunction although to construe it is the course that Judge Werker ultimately followed. As an order construing Judge Metzner's prior order, Judge Werker's order is not appealable under 28 U.S.C. §1292(a)(1). Securities and Exchange Commission v. Investment Corporation of America, 369 F.2d 383 (7th Cir. 1966).

Appellants have not established the appealability of Judge Werker's order. That order was neither a modification nor a continuation of the injunction, but a construction of it. As such, it is not appealable, and this appeal must therefore be dismissed.

POINT II

JUDGE WERKER'S ORDER, EVEN
IF DEEMED APPEALABLE, IS
PROPER AND SHOULD BE AFFIRMED

Judge Werker's order was proper in view of the defiance of the underlying preliminary injunction and the International Trustee's genuine need for information concerning benefit funds for Local 400's members. Thus, the order should be affirmed in all respects.

It was necessary for Judge Werker to issue his order in aid of the preliminary injunction because Louis Commarato, the former President and Business Manager of Local 400, continued to resist both the trusteeship and the injunction enforcing it. Judge Metzner's opinion stated that an injunction to enforce the trusteeship would be signed in view of both the "essentially unrefuted" factual allegations that Local 400's financial corruption had resulted in a \$400,000 loss to the International (A6, A7, A9) and "the obvious showing of irreparable harm involved with the potential further continuation in power of the individual defendants... ."(A10, A11). The trusteeship and an enforcing injunction were deemed appropriate since the plaintiff International had acted for purposes approved by its own International Constitution and by the statute, §302 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §462 (A19). That section provides:

"Purposes for establishment of trusteeship: Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization."

Accordingly, the court issued the broad preliminary injunction prohibiting Local 400, its officers, agents and employees from refusing to cooperate with the International trustee's assumption of complete control over Local 400's affairs (A12-A13).

After Judge Metzner's opinion had been issued, but before the preliminary injunction was signed, Commarato resigned as Local 400's President and Business Manager. Later, he asserted that this resignation relieved him of responsibility under the injunction (A26), a position he apparently abandons in this Court. He does, however, continue to maintain that his dismissal from the action in his individual capacity makes Judge Werker's order improper (Appellants' Brief, p. 8).

As noted earlier, Judge Werker's order runs against Mr. Commarato in his capacity as "President and Business Manager of Local Union No. 400" (A.28). The order directs that Commarato remedy his unlawful conduct taken by virtue

of his relation to Local 400 and in defiance of the trusteeship. Rule 65(d), Federal Rules of Civil Procedure, provides that an injunction order

"...is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Surely, the meaning of Rule 65(d) here is that Louis Commarato, as Local 400 President, is bound by the court orders as a Local 400 officer and agent with notice of the order. Commarato's dismissal "individually" is expressly limited as such by the motion which the court endorsed (A3). Much is made of the fact that Judge Metzner signed the preliminary injunction order submitted by Mr. Commarato rather than the one submitted by plaintiff. Yet the difference between the two draft orders is simply that the signed order runs against the defendant Local 400, "their officers, employees and agents" (A12), whereas the unsigned order identifies these officers by name and position (A14).

Commarato's resignation as an officer does not undo his unlawful acts or relieve his responsibility for them. Nor does his resignation diminish either the court's authority or his responsibility under its orders. Judge Werker's order "...should be broad enough to prevent evasion" as here attempted.

Local 167, International Brotherhood of Teamsters v. United States, 291 U.S. 293, 299 (1934). The order Judge Werker issued was broad enough, and, in light of the circumstances, proper in requiring Mr. Commarato by name to comply with the injunction.

The International trustee's legitimate need for the information described in Judge Werker's order makes the scope of the order proper. The information sought is essential to the trusteeship's goals, including correction of the local union's financial malpractice and the proper operation of the local for the protection of the members. The collective bargaining agreements which the Trustee had obtained upon assuming control of Local 400 provide that employers of Local 400 members are to make substantial contributions to employee benefit funds. Employers are bound to contribute amounts equal to as much as 6% of employees' gross weekly earnings to a "Welfare Fund" (A18). Employers are obligated to contribute an amount equal to as much as 4% of employees' gross weekly earnings to a "Sheet Metal Production Pension Fund" (A18). By contract terms, these sums are to be paid directly to the local union, and thus to the trustee appointed by the International. Consequently, it is necessary for the performance of the contracts that the Trustee have the instruments which create these funds and specify what is to be done with

the payments. Since the assurance of the performance of collective bargaining agreements is one of the purposes for imposition of a trusteeship under the statute, 29 U.S.C. §462, supra, the court's order in support of such purpose is proper. See National Association of Letter Carriers v. Sombrotto, 449 F.2d 915, 919 (2d Cir. 1971).

Judge Werker's order is essential also so that the Trustee can determine the legality of the methods of fund contribution and what practices, if any, must be corrected. The provision for payment of employer contributions directly to Local 400 appears to be in violation of Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. §186. Trustee Pasquinucci informed the court of the apparent illegality (A19 - A20), and said:

"Thus, the critical need for a full and complete investigation into the finances and structure of Local 400 can only be met if I obtain all trust agreements, pension and welfare plans and Rules and Regulations, and all amendments thereto, bankbooks, and related documents." (A20).

The Trustee stated also that Louis Commarato, in addition to having been President and Business Manager of Local 400, was believed to be the administrator of the benefit funds. In view

of the financial corruption already unearthed within the local union and the apparently illegal fund contribution, the Trustee's demand must be enforced to ensure that any necessary corrective action is taken. At the time Judge Werker issued his order, it had become clear that the Local 400 membership, for whose sole and exclusive benefit the funds must be maintained (29 U.S.C. §186(c)(5)), would not be fully protected under the trusteeship unless and until all the books and records of the benefit funds were turned over to the Trustee.

In recognition of the importance of access to benefit funds' books and records when a local union is placed under trusteeship, it has been held that an International Trustee must have such full access "in order to ascertain whether the trust funds' benefits are being properly administered in accordance with the collective bargaining contracts." Wynn v. Heller, 391 F. Supp. 507 (S.D.N.Y. 1975). In Wynn, the plaintiff International Trustee was "authorized to take complete charge of the affairs of the local". (391 F. Supp. at 508). The court enjoined the defendant, a local union benefit fund trustee, from receiving a salary from either fund, but declined to remove him as a trustee by a preliminary injunction. The court acknowledged that "...the funds are considered separate and distinct entities from the local union", but it instructed that "defendant Heller is directed to cooperate fully with plaintiff Wynn's request to examine the [funds'] books and records... ." (391 F. Supp. at 512).

In the present situation, as in Wynn, the fact that the Local 400 benefit funds may be legal entities separate from the union is no reason to deny the Trustee the books and records he requires. Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. §186(c)(5), which permits employers to contribute to such union benefit funds, also requires that control of the funds be exercised jointly by representatives of the union and the employers. The International Trustee needs the funds' documents in order to identify the union representatives and the means of their designation to and removal from the funds' controlling bodies. Exercising Local 400's statutory control over its benefit funds is part of the Trustee's responsibility under the trusteeship and the underlying injunction. Thus, Judge Werker's enabling the Trustee to do so promotes the purpose of the statute.

Judge Werker's order is also consistent with the purpose of the Employee Retirement Income Security Act. It is the policy of that Act that "...disclosure be made and safeguards be provided with respect to the establishment, operation and administration..." of employee benefit plans "...owing to the lack of employee information and adequate safeguards concerning their operation." 29 U.S.C. §1001; see also, Welfare and Pension Plans Disclosure Act, 29 U.S.C. §301; Labor Management Reporting and Disclosure Act, 29 U.S.C. §401. Judge Werker's order assures that the operation and

and structure of the funds will be monitored by the Trustee for the benefit of Local 400's members. Appellants' arguments would insulate Local 400's own benefit funds from scrutiny by its Trustee, and render it unaccountable to its members.

It is clear that Judge Werker's order is fully justified in view of the defiance of Judge Metzner's injunction enforcing the trusteeship and in view of the International Trustee's need for information concerning the Local 400 funds in order to protect the local union membership. Moreoever, the order was appropriately directed at defendant-appellant Commarato in his capacity as a union officer, especially considering his attempts to avoid the injunction, the financial corruption apparent within the local union, and the possibly unlawful structure of the benefit funds. Finally, Judge Werker's order was well within the court's power because the trusteeship entitled the Trustee to full control over the local union, including the exercise of its lawful degree of control over its benefit trust funds. Therefore, Judge Werker's order should be affirmed in all respects.

CONCLUSION

FOR THE ABOVE-STATED REASONS,
THE ORDER APPEALED FROM SHOULD
BE AFFIRMED.

Respectfully submitted,

COHEN, WEISS and SIMON
Attorneys for Plaintiff-Appellee
605 Third Avenue
New York, New York 10016
(212) 682-6077

Of Counsel:

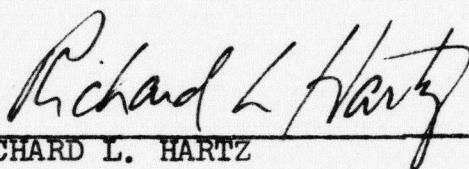
Richard L. Hartz

Dated: December 6, 1976

CERTIFICATE OF SERVICE

The undersigned certifies that he has served the foregoing BRIEF OF PLAINTIFF-APPELLEE upon Defendants-Appellants by depositing two copies thereof in an envelope in the United States mail, postage prepaid, addressed to the following counsel of record on this 6th day of December, 1976:

Charles R. Katz, Esq.
Attorney for Defendants-Appellants
360 Lexington Avenue
New York, New York 10017


RICHARD L. HARTZ